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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 771

MONTGOMERY FLY CAMERON,
Petitioner,

v.

W. B. HAUCK,

Sheriff of Bexar County, Texas
Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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v.

W. B. HAUCK,
Sheriff of Bexar County, Texas
Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Petitioner, Montgomery Fly Cameron, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on September 5, 1967. (Rehearing denied October 4.)

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals, printed as Appendix A hereto, is reported in 401 S.W. 2d 809. The United States District Court order and that court's Findings of Fact and Conclusions of Law are unreported and are printed as Appendix B hereto. The opinion of the United States Court of Appeals, not yet reported, is printed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was dated and entered September 5, 1967. Timely petition for rehearing was filed on September 25, 1967 and was denied by the Court of Appeals on October 4, 1967. (Appendix D) The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Sixth Amendment right to be informed of the nature and cause of the accusation, which includes the requirement that the charging papers state the elements of the offense, is a part of Fourteenth Amendment due process and is obligatory upon the States and forbade petitioner's prosecution for theft by false pretext on an ordinary theft indictment which did not allege actual appropriation, an essential constituent element of the Texas offense of theft by false pretext.

2. Whether petitioner was deprived of Fourteenth Amendment due process and of a hearing on the above stated constitutional point, that his indictment omitted an essential element of the offense for which he was prosecuted, by a retroactive redefinition of the offense by the Texas Court of Criminal Appeals opinion below, eliminating the element of actual appropriation theretofore held by that Court to be essential to complete the offense of theft by false pretext.

3. Whether petitioner was deprived of Fourteenth Amendment due process because his conviction was based upon a verdict incapable of being shown not

to rest on a constitutionally impermissible basis, to wit, an inculpatory theory without support in the evidence.

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional provisions and statutes which this case involves are:

(1) The provision of the Sixth Amendment to the Constitution of the United States, "In all criminal prosecutions the accused shall enjoy the right . . . . to be informed of the nature and cause of the accusation", and the provision of the Fourteenth Amendment to that Constitution, "nor shall any State deprive any person of life, liberty, or property without due process of law;"

(2) Article 1410 and Article 1413 Vernon's Annotated Texas Penal Code of 1925, Vol. 3, page 218 (Art. 1410) and page 287 (Art. 1413).

ARTICLE 1410

"Theft" is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

ARTICLE 1413

The taking must be wrongful, so that if the property came into the possession of the person accused of theft

by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.

STATEMENT OF THE CASE

The United States District Court Findings of Fact correctly state the case (Appendix B). The Court of Appeals affirmed a District Court order denying habeas corpus relief sought by petitioner after the Texas Court of Criminal Appeals affirmed his conviction on a single count indictment which alleged ordinary theft, as defined by Texas Penal Code Article 1410, charging that petitioner took money without the owner's consent and with the intent to appropriate the money, and not alleging actual appropriation. The State prosecuted the case under a different theory and statute (Article 1413), contending that the defendant received $3400 from an insurance company with the company's consent induced by false representation and followed by actual appropriation of the money, and the State trial court submitted the case to the jury as a prosecution for theft by false pretext.

In the State trial court petitioner timely filed three motions to quash the indictment. The court overruled said motions and petitioner duly excepted. (Transcript of District Court of Bexar County, Texas, Petitioner's Exhibit 1 in United States District Court, pages 20 through 28. United States District Court Finding of Fact No. 8, Appendix B, (p. 26.) The ques-

tions presented here were presented, briefed and adversely determined in the Texas Court of Criminal Appeals. (Appendix A, United States District Court Finding of Fact No. 5, Appendix B, p. 26.)

Prosecution for theft by false pretext (Article 1413) on an indictment for ordinary theft (Article 1410) has been permitted by the Texas Court of Criminal Appeals in many cases and for many years (District Court Conclusions of Law, Appendix B, p. 28); but the first Question Presented here has not been considered previously by the federal courts.

The elements of the Texas offense of theft, as defined by Article 1410, are a fraudulent taking without consent, and intent to deprive the owner of, and to appropriate, the property taken. The United States District Court correctly concluded that the Article 1410 offense of theft is complete without actual appropriation (Appendix B, p. 27). *Heidenreich v. State*, 168 S.W.2d 254 (1943); *Westerman v. State*, 161 S.W.2d 95 (1942).[1]

The elements of the offense of theft by false pretext, as defined by Article 1413, are a taking by false pretext, or with intent to appropriate, and an appropriation. Under Article 1413 the subsequent actual

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[1] *Heindenreich*, 168 S.W.2d p. 256, after quoting Article 1410: "Thus, it will be noted that a person who fraudulently takes property from another need not actually appropriate such property in order to be guilty of theft. It is sufficient if he at the time entertains an intent to do so."

Westerman, 161 S.W.2d p. 96: "The car having been taken without the owner's consent, it was not necessary that the appropriation be consummated or completed."

appropriation of the property is an essential element of theft by false pretext. *Brown v. State*, 392 S.W.2d 126 (1965); *Redding v. State*, 265 S.W.2d 811 (1954); *King v. State*, 213 S.W.2d 541 (1948); *Black v. State*, 149 S.W.2d 968 (1941); and the opinion in this case.[2]

In a theft by false pretext case the jury charge must require a finding of appropriation, in order to convict. *Byrd v. State*, 388 S.W.2d 196 (1965), *Schoenbeck v. State*, 288 S.W.2d 121 (1956). And the evidence must show appropriation, in order to convict. *Brown v. State*, 392 S.W.2d 126 (1965); *McCuistion v. State*, 158 S.W.2d 527 (1942); *Black v. State*, 149 S.W.2d 968 (1941).

In a Texas theft by false pretext prosecution on an

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[2]*Brown*, 392 S.W.2d p. 27: "Article 1413 Vernons Ann. P.C. relating to theft by false pretext provides, as an element of the offense, that the property obtained by false pretext be appropriated to the use and benefit of the person taking same."

Redding, 265 S.W.2d p. 813, quoting from *King*, 213 S.W.2d p. 542: "The constituent elements of theft by false pretext consist, first, in obtaining the property by means of a false pretext; second, that at the time the property is so obtained the accused had the intent to deprive the owner of the value thereof and to appropriate it to his own use and benefit; and third, that pursuant to said intent said property was appropriated by the accused."

Black, 149 S.W.2d p. 971: "Concluding that the state has failed to show appropriation as an essential element of the offense for which the conviction was had, the judgment of the trial court is reversed and the cause remanded."

Cameron, 401 S.W.2d p. 811: "We do not agree that the instruction given by the court omitted as an essential element of the offense the actual appropriation of the money. The charge, taken as whole, included such element in the court's definition of the offense and application to the facts and fairly submitted the issue of appellant's guilt to the jury."

indictment which alleges a taking by pretext, the indictment is fatally defective if it does not allege that the property was appropriated. *Brown v. State*, 95 Tex. Cr. R. 664, 255 S.W. 750; *Price v. State*, 49 Tex. Cr. R. 131, 91 S.W. 571; *McCuistion v. State*, 158 S.W.2d 527.

That the petitioner was in custody, that the United States District Court had territorial jurisdiction, that State remedies were exhausted, and that petitioner previously had not sought federal relief, were not disputed. The District Judge issued a certificate of probable cause (Appendix B).

REASONS FOR GRANTING THE WRIT

Insufficiency Of The Indictment

The Texas Court of Criminal Appeals has decided the federal question concerning the sufficiency of the indictment in a way not in accord with applicable decisions of this Court, in that the Texas Court approved an indictment which omitted an essential element of the statutory offense for which petitioner was prosecuted, and which did not charge the offense prosecuted, but charged a related offense differently defined by another statute.

In federal prosecutions the Sixth Amendment right to be informed of the nature and cause of the accusation includes a requirement that the indictment shall set forth the elements of the offense charged. *United States v. Debrow*, 346 U. S. 374, 376, 74 S. Ct. 113, 98 L.ed. 92, 96; *Hagner v. United States*, 285 U. S. 427, 431, 52 S. Ct. 417, 76 L.ed. 861, 865; *United*

States v. Carll, 105 U. S. 611, 26 L. ed. 1135; *Stirone v. United States*, 361 U. S. 212, 218, 80 S. Ct. 270, 4 L. ed. 2d 252, 257; *Russell v. United States*, 369 U. S. 749, 763, 764, 82 S. Ct. 1038, 8 L. ed. 2d 240, 250, 251. Notice of the specific charge is a requirement of due process under the Fourteenth Amendment. *Cole v. Arkansas*, 333 U. S. 196, 68 S. Ct. 514, 92 L. ed. 644.

Relying on these decisions, petitioner urged in the Texas Court of Criminal Appeals the proposition that Fourteenth Amendment due process also includes a requirement that a formal accusation[3] shall set forth the elements of the offense. The Texas Court held that *Cole v. Arkansas* was not applicable, stating that ordinary theft and theft by false pretext are "not different offenses" and that theft by false pretext, as defined by Article 1413, "is but another form of theft."[4] The Texas Court did not discuss petitioner's contention that the sufficiency of a state indictment should be measured by the "elements of the offense" criterion (*Russell*, 369 U. S. p. 763), nor did the Texas Court refer to its own perennial holdings that actual appropriation of the property is a "constituent element" and is an "essential element of the offense" of theft by false pretext (footnote 2, supra), and that in a theft by false pretext prosecution the jury charge must expressly require a finding of appropriation, in

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[3]This case does not involve procedural differences in formal accusations. In a felony case the Texas Constitution (Art. 1, Sec. 10) requires indictment of a grand jury. Presumably the questions presented here would be applicable to a formal accusation by information or otherwise.

[4]Cf. *Russell*, 369 U.S. p. 768, "the requirement that an indictment set out 'the specific offense, coming under the general description' ".

order to convict, and the evidence must show an appropriation (cases cited in Statement, supra), and that the offense of ordinary theft is complete without actual appropriation (footnote 1, supra).

In the light of this settled Texas law concerning the elements of theft by false pretext and ordinary theft, the State decision below must be construed to hold either that due process does not require that an indictment state the elements of the offense as they have been legislatively and judicially defined, and used to determine the sufficiency of proof and of jury instructions, or that by the decision in this case the offenses of theft and theft by false pretext are retroactively redefined and that the cases holding that the two offenses have different elements are overruled.

If the State decision below be construed to hold that a Texas indictment need not state the elements of the offense charged, then that decision is in conflict with *Cole v. Arkansas*, 333 U. S. 196, and it is in conflict in principle with *Russell v. United States*, 369 U. S. 749, and other Sixth Amendment decisions of this Court stating the criteria for measuring the sufficiency of the charging papers. If the State decision below be construed as holding that the offense definition and elements consistently applied in Texas to questions of proof and jury instructions are not applicable to questions of the sufficiency of an indictment, then that decision is in conflict in principle with *Russell v. United States*, because such a holding would disregard and deny the significant protections which an indict-

ment is intended to guarantee.[5]

The right to charging papers which state the elements of the offense is no less important to a fair trial than the other Sixth Amendment rights now incorporated in due process.[6] Notice of the true nature of the charge is "the first and most universally recognized requirement of due process." *Smith v. O'Grady*, 312 U. S. 329, 61 S. Ct. 572, 85 L. ed. 859, 862. The question presented is a timely one and deserves definitive determination, because the Texas opinion here has dangerously diminished a fundamental right which, long before the decisions concerning other Sixth Amendment rights, was recognized to be a part of due process applicable to the States under the Fourteenth Amendment.[7]

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[5] *Russell:*
369 U.S. p. 763, "sufficiently apprises the defendant of what he must be prepared to meet";
369 U.S. p. 764, "shows with accuracy to what extent he may plead a former acquittal or conviction";
369 U.S. p. 770, prevents convictions "on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him";
369 U.S. p. 770, "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction".

[6] *Gideon v. Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L.ed. 2d 799; *Pointer v. Texas*, 380 U. S. 400, 85 S. Ct. 1065, 13 L.ed. 2d 923; *Klopfer v. North Carolina*, 386 U. S. 213, 87 S. Ct. 977, 18 L.ed. 2d 1; *Washington v. Texas*, 388 U. S. 14; *Estes v. Texas*, 381 U. S. 532, 559-560, 85 S. Ct. 1628, 14 L.ed. 2d 543, 559-560.

[7] The common law background and the evolution of the requirement of a specific formal accusation are discussed in a scholarly Amicus Curiae Brief filed in this case in the Texas Court of Criminal Appeals by Maury Maverick, Jr. as General Counsel for the San Antonio Chapter of the Texas Civil Liberties Union. That brief is attached to the Petition for Writ of Habeas Corpus as Exhibit F and is a part of the record in this case.

Retroactive
Redefinition Of Offense

A separate important federal question is presented by the Fifth Circuit determination that the definition of the two offenses by the Texas court in the Cameron case supported the State decision affirming the conviction.

That the Fifth Circuit did not consider the construction given these statutes prior to *Cameron* is indicated by its holding that the use of "appropriation" in the statute does not create a defense to the crime. (Appendix C, p. 40). This was not the law before *Cameron*. *Byrd*, 388 S.W.2d 196; *Schoenbeck*, 288 S.W.2d 121; *Brown*, 392 S.W.2d 126; *McCuistion*, 158 S.W.2d 527; *Black*, 149 S.W.2d 968. The lack of appropriation constituted an absolute defense for petitioner. *Johnson v. State*, 397 S.W.2d 857 (1966).

The Fifth Circuit stated that the "Constitution does not impropriate the crime-defining functions of the states," and accepted as an adequate state ground the offense definition used *in this case* by the Texas court.

This Fifth Circuit holding is in conflict in principle with *Bouie v. City of Columbia*, 378 U. S. 347, 84 S. Ct. 1697, 12 L.ed. 894, because the Court of Appeals has approved a State court retroactive construction of Articles 1410 and 1413, redefining those offenses and the elements thereof. Even if the decisions below have now changed the Texas law concerning the elements of theft and theft by false pretext, petitioner may not thereby be deprived of his constitutional point that at the time of his trial the offenses were different

and appropriation was an element of the offense for which he was prosecuted.

No Evidence On Alternative Basis For Verdict

The Court of Criminal Appeals agreed that there was no proof for one of the inculpatory theories submitted, to wit, the theory that appellant obtained the money in question by a representation that the cuff links were *stolen*. It is "a violation of due process to convict and punish a man without evidence of his guilt", *Thompson v. Louisville*, CFB U.S. 199, 206, 80 S. Ct. 624, 4 L.ed 2d 654, 659; and "it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." *Garner v. Louisiana*, 368 U.S. 157, 164, 82 S.Ct. 248, 7 L.ed. 2d 207, 214.

The Court of Criminal Appeals held that the verdict may be saved by applying it to one of the two inculpatory theories having support in the evidence. This view, though having support in previous Texas cases, is no longer tenable under applicable federal decisions. A similar view urged by the California Supreme Court was categorically rejected in *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.ed. 1117.

In this respect the decisions below are also in conflict in principle with: *Williams v. North Carolina*, 317 U. S. 287, 63 S. Ct. 207, 87 L.ed. 279; *Terminiello v.*

Chicago, 337 U. S. 1, 69 S. Ct. 894, 93 L. ed. 1131; *Sealfon v. United States*, 332 U. S. 575, 68 S. Ct. 237, 92 L.ed. 180; *Shuttlesworth v. City of Birmingham*, 382 U. S. 87, 92, 86 S. Ct. 211, 15 L.ed. 2d 176.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion In Texas Court of Criminal Appeals

Montgomery Fly Cameron, Appellant

No. 39,056, v. —Appeal from Bexar County

The State of Texas, Appellee

OPINION

The conviction is for felony theft; the punishment, two years.

Prosecution was upon an indictment for ordinary theft which charged that on or about the 24th day of September, 1964, the appellant did unlawfully and fraudulently take money of the United States of America of over the value of $50 from one Charles J. Hedlund.

It was shown by the state's evidence that in December, 1963, the appellant received as a gift from a woman in San Antonio two Cabochon emerald cuff links which had been specially cut and mounted by Julius Cohen, a jeweler in New York City. The two cuff links weighed 58.31 carats and had an appraised value of $3,400. It appears that the cuff links were not to appellant's liking and he contacted the jeweler, Cohen, relative to trading them for some other cuff links. Early in 1964, Cohen went to San Antonio and took the two cuff links back to New York with him. A number of letters were then written by appellant to Cohen and on March 30 appellant requested that the cuff links be returned to him. Cohen testified that

they were immediately sent to appellant by registered mail and that later, in April, 1964, a trade was made whereby appellant would receive some sapphire cuff links, and the two emerald cuff links were returned to him (Cohen) in New York. Cohen testified that he had possession of the two emerald cuff links from the time he received them in April, 1964, until he delivered them in Houston to Sgt. Brookbank, of the Alamo Heights police department, in January, 1965. The two emerald cuff links were positively identified by Cohen and introduced in evidence as state's exhibit #1.

It was further shown that appellant had a jewelry floater policy with the Aetna Casualty and Surety Company of Hartford, Connecticut, and that on January 10, 1964, the same was amended by adding Item #14, described as one pair of gold Cabochon emerald cuff links weighing 58.31 carats and valued at $3,400.

On July 27, 1964, appellant called the witness Travis Bailey, who was the representative of the Aetna Casualty and Surety Company in San Antonio, and reported that the two emerald cuff links had been lost. Bailey went to appellant's office, and appellant again stated that the cuff links had been lost, or had disappeared. At such time appellant requested that the loss not be referred to the police as he did not want any publicity in the matter.

Appellant's claim was thereupon referred to Charles Hedlund, a claims representative in San Antonio for the company. After investigation and a conference with appellant in which appellant stated to the ad-

juster that the cuff links were lost, Hedlund prepared a statement of claim which was referred to as a proof of loss and delivered it to appellant's office with a draft dated September 22, 1964, signed by the witness as representative of the Aetna Casualty and Surety Company, payable to appellant in the sum of $3,400. On September 23, 1964, appellant signed the proof of loss and on September 24, 1964, the draft was deposited to appellant's personal and separate account in the National Bank of Commerce in San Antonio.

Testifying as a witness in his own behalf, appellant swore that he did not return the two emerald cuff links to Cohen in April, 1964, and that he (appellant) had possession of them in San Antonio when they were discovered missing some time during the week of July 20, 1964. He further swore that the cuff links introduced in evidence as state's exhibit #1 were not the two missing cuff links.

The court submitted the issue of appellant's guilt to the jury upon the state's theory of theft by false pretext and authorized the jury to convict appellant if they found from the evidence beyond a reasonable doubt that he obtained possession of the money from Charles J. Hedlund by fraudulently representing to him that he owned a set of cuff links which were lost, stolen, or misplaced.

The charge given by the court was substantially the same as that given in King v. State, 213 S.W. 2d 541, which is set out in 5 Branch's Ann. P.C. 2d 130-132, Sec. 2683.1.

We do not agree that the instruction given by the

court omitted as an essential element of the offense the actual appropriation of the money. The charge, taken as a whole, included such element in the court's definition of the offense and application to the facts and fairly submitted the issue of appellant's guilt to the jury.

Nor do we agree that the court erred in refusing to give a charge on circumstantial evidence. The testimony in the case is tantamount to direct evidence that appellant obtained the money from the injured party, Hedlund. It is the rule that where there is direct evidence that the accused took the property and his fraudulent intent is to be inferred from the main fact proven, no necessity exixsts for a charge on circumstantial evidence. See: Green v. State, 161 S.W. 2d 1074, and cases there cited.

It is insisted that there was a fatal variance between the allegation in the indictment that the taking of the money was from the possession of Charles J. Hedlund and the proof because the evidence showed that Hedlund did not have the actual control, care, and management of the money at the time of the taking. Metzger v. State, 325 S.W. 2d 396, is cited and relied upon in support of such contention.

The record does not support appellant's contention.

The witness Hedlund, in whom possession of the money was alleged in the indictment, testified that he was the claims representative for Aetna Casualty and Surety Company and had held such position for twelve years. He explained in detail how reserve funds were set up in his office to pay claims, and swore

that he was authorized to pay the claim. As a representative of the company he was shown to be a special owner of the money, and the state was authorized to allege ownership in him. Art. 402, V.A.C.C.P.; Kitchen v. State, 62 S.W. 2d 144; Bradford v. State, 342 S.W. 2d 319.

The fact that the draft issued to appellant was not paid until it was received by the drawee bank in Hartford, Connecticut, five days after being deposited in San Antonio does not support appellant's contention of variance. The record is clear that appellant received the money when the draft was deposited to his account in the bank in San Antonio on September 24. The fact that he received a draft, which he deposited, rather than money does not present a variance. McMorries v. State, 279 S.W. 2d 90.

Metzger v. State, supra, cited by appellant, is not applicable, because in that case the person in whom possession of the money was alleged in the indictment was not an officer, member, or investor in the corporation which lost the money and could not, in law, have been the special owner of the same.

Appellant insists that his conviction violates due process of law because the record does not show that there was evidence to support the jury's verdict in the case.

It is appellant's contention that because the court's charge authorized the jury to convict him upon a finding that he fraudulently represented that the set of cuff links was "lost, stolen, or misplaced" and there was no proof that he represented that the cuff links

were stolen it is impossible to determine whether the verdict had any factual basis in the evidence.

While there was no proof that appellant represented that the cuff links were stolen, there was proof in the record that he represented that they were lost or misplaced. The general verdict of guilty can be applied to that portion of the charge submitting the question of his misrepresentation that they had been lost or misplaced, which has support in the evidence. 57 Tex. Jur. 2d 66, Sec. 434; Blankenship v. State, 310 S.W. 2d 579.

The contention is overruled.

In a most exhaustive brief and in oral argument, appellant insists that his conviction for theft by false pretext under the indictment for ordinary theft constitutes a denial of due process.

Appellant recognizes the many decisions by this court holding that a conviction for theft by false pretext under the provisions of Art. 1413, V.A.P.C., may be had upon an ordinary indictment for theft but insists that these decisions are wrong and should be overruled.

It is insisted that the indictment for ordinary theft presented against appellant did not include all the essential elements of the offense of theft by false pretext—such as the element of appropriation—and therefore constituted a denial of his right to demand the nature and cause of the accusation against him, as guaranteed by the Sixth Amendment to the Consittution of the United States, which was made obligatory

upon the States by the recent decision of the Supreme Court of the United States in Pointer v. Texas, 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065. Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644, 68 S.Ct. 514, among other authorities, is relied upon in support of appellant's contention.

It is also insisted that appellant's conviction under the ordinary theft indictment which omitted an essential element of theft by false pretext constituted a denial of his right to equal protection of the law, under the Fourteenth Amendment to the Constitution of the United States, because an accused who was being prosecuted for the same offense upon an indictment for theft by false pretext would be protected by the rule that each essential element of the offense must be alleged or the indictment is fatally defective.

We have carefully considered the argument and authorities presented by appellant, and remain convinced that the decisions by this court holding that a conviction for theft by false pretext may be had upon a general indictment for theft are sound and should not be overruled.

Art. 1410, V.A.P.C., defines theft in general, as follows:

> " 'Theft' is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking."

Art. 1413, supra, provides:

> "The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete."

Theft by false pretext, as defined in Art. 1413, supra, is but another form of theft.

Under the provisions of Art. 1413, supra, the only difference between theft by false pretext, defined therein, and ordinary theft is the circumstances by which the property comes into possession of the accused.

Under either statute, Art. 1410 or 1413, supra, to constitute theft the original taking must be wrongful and fraudulent.

In the early cases of Smith v. State, 35 Tex. 739, and Maddox v. State, 41 Tex. 205, it was held that ordinary theft and theft by false pretext were not different offenses but only different in the facts and circumstances surrounding the taking, which need not be averred in the indictment.

We adhere to the holding that such facts and circumstances are evidentiary matters which need not be alleged.

Cole v. Arkansas, supra, cited by appellant, is not here applicable, because in that case the conviction of an accused was affirmed by the Supreme Court of Arkansas for an offense, under one section of a statute, for which he was neither charged nor tried in the trial court.

Here, appellant was charged, tried, and convicted for the one offense of felony theft as denounced and defined in Articles 1410 to 1419, Title 17, Chapter 8, of Vernon's Annotated Penal Code of this State.

DeJonge v. Oregon, 299 U. S. 353, 81 L. ed. 278, 57 S. Ct. 255, also cited by appellant, is not here applicable, because in that case the conviction was upon a charge not made in the indictment.

Finding the evidence sufficient to support the conviction, and no reversible error appearing, the judgment is affirmed.

DICE, Judge

(Delivered February 23, 1966)

Opinion approved by the court.

APPENDIX B

DISTRICT COURT FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MONTGOMERY FLY CAMERON

v.

W. B. HAUCK, SHERIFF OF BEXAR COUNTY, TEXAS

Civil Action 66-57-SA

In the Matter of the Application of Montgomery Fly Cameron for a Writ of Habeas Corpus

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FINDINGS OF FACT

1. On the 16th day of May, 1966, when the petition for writ of habeas corpus was filed and presented in this case, the petitioner was in the custody of the respondent, W. B. Hauck, Sheriff of Bexar County, Texas, and petitioner was detained in custody by re-

spondent at the Bexar County Jail in San Antonio, Bexar County, Texas.

2. On said date the respondent held the petitioner in custody pursuant to a Capias issued on the 12th day of May, 1966 by the Clerk of the District Court of Bexar County, Texas. Said Capias was issued pursuant to the Mandate of the Court of Criminal Appeals of the State of Texas, which Mandate was issued by the Clerk of said Court on the 11th day of May, 1966. Said Mandate was issued pursuant to the determination and order of the Texas Court of Criminal Appeals on April 27th, 1966 overruling the Motion for Rehearing of appellant Montgomery Fly Cameron and affirming the July 14th, 1965 judgment and sentence of the 144th Judicial District Court of Bexar County, Texas, by which the petitioner was convicted of the offense of theft of over $50.00 and sentenced to imprisonment for a term of two years.

3. By this habeas corpus application for discharge from custody petitioner asserts three grounds for relief, as follows:

A. The Sixth Amendment right to demand the nature and cause of the accusation, which includes the requirement that an indictment allege the essential elements of the offense, is a part of due process and is obligatory upon the States, and forbids prosecution for theft by false pretext on an indictment which charges a different offense and omits an essential element of theft by false pretext.

B. Petitioner was deprived of Fourteenth Amendment equal protection of the laws, in that he

was charged by an ordinary theft indictment which omitted an essential element of the theft by false pretext offense for which he was prosecuted, while an accused being prosecuted for the same offense on a false pretext indictment would be protected by the Texas rule that each essential element of that offense must be alleged or the indictment is fatally defective.

C. Petitioner was deprived of due process of law as guaranteed by the Fourteenth Amendment, because his conviction was based on a verdict incapable of being shown not to rest on a constitutionally impermissible basis, to wit, an inculpatory theory without support in the evidence.

4. Respondent asserts several grounds of defense to petitioner's assertions:

A. That the Texas Courts have construed the State Law in such a way that Theft and Theft by False Pretext under Articles 1410-1419 of the Penal Code of Texas are one offense; the difference being the means only by which possession is acquired.

B. That numerous State cases have supported for many years the conviction of Theft By False Pretext on an ordinary Theft indictment, and that the procedure seems to have been to try the defendants charged with Theft By False Pretext on ordinary Theft Indictments. The State contends that this is normal procedure in such cases.

C. That this Petitioner was afforded, in addition to the Indictment, a full Examining Trial in accordance with State procedure then in vogue, in which

he was allowed to view most of the written exhibits used against him, and to cross examine the key witnesses by counsel, before the formal indictment was ever returned. The State of Texas contends that this procedure, taken in toto, placed the Petitioner on notice of the nature of the accusation against him.

5. Petitioner has exhausted the remedies available in the courts of the State of Texas, in that petitioner duly and timely appealed to the Texas Court of Criminal Appeals from his conviction in the 144th Judicial District Court of Bexar County, Texas. All of the grounds stated above were presented, urged and briefed in the Texas Court of Criminal Appeals and were discussed and determined adversely to petitioner by the Court of Criminal Appeals.

6. No prior petitions for habeas corpus have been filed.

7. The indictment upon which the petitioner was prosecuted alleged the offense defined by Texas Penal Code Article 1410, that petitioner was guilty of taking money from the owner thereof without his consent.

8. Petitioner timely filed three motions to quash the indictment. The trial court overruled said motions and petitioner duly excepted. Said motions are set forth on pages 20 through 28 of the transcript, which is petitioner's Exhibit 1.

9. The State offered evidence to the effect that the defendant induced an insurance company to pay him $3,400.00 by making false statements to an agent of

the company. The defendant testified and asserted his innocence.

10. The State trial court submitted the case to the jury under Texas Penal Article 1413 concerning a taking with consent induced by false pretext and followed by an actual appropriation of the property.

11. When the trial court instructed the jury concerning the making of a false pretext as an essential element of the offense, the Court charged on the theory that the defendant represented "to Charles J. Hedlund that he owned a set of emerald cuff links which were lost, stolen or misplaced."

CONCLUSIONS OF LAW

1. Under Texas law the subsequent actual appropriation of property is an essential element of the Article 1413 offense of theft by false pretext. *Cameron v. State*, 401 S.W. 2d 809; *Byrd v. State*, 388 S.W. 2d 196 (1965). The Article 1410 offense of theft is complete without actual appropriation. *Heidenreich v. State*, 168 S.W. 2d 255, 256 (1943).

2. Under Texas law if an accused is prosecuted for the offense of theft by false pretext and if the pleader attempts by the averments in the indictment to charge theft by false pretext, the indictment must not only allege an intent to appropriate the property at the time it was acquired, but must also allege that the property was so appropriated, and without said latter allegation the indictment is fatally defective. *Brown v. State*, 95 Tex.Cr.R. 664, 255 S.W. 750; *Price v. State*, 49 Tex.Cr.R. 131, 91 S.W. 571; *McCuistion v. State*, Tex. Cr. App. 1942, 158 S.W. 2d 527, 530.

3. Theft and Theft by False Pretext are one offense in Texas as construed by the highest court of that State, and prosecution for Theft by False Pretext may be had on an ordinary theft indictment. *McCuistion v. State*, 158 S.W. 2d 527, 141 ALR 205; *Hawkins v. State*, 1910, 126 S.W. 268, 269; *Riggs v. State*, 1934, 70 SW 2d 164, 165; *Gibbs v. State*, 1952, 253 SW 2d 1002, 1003; *Holloway v. State*, 1962, 362 SW 2d 325; *Vick v. State*, 1966, 397 SW 2d 229; *Hogan v. State*, 1965, 393 SW 2d 898; *Anders v. State*, 1961, 350 SW 2d 549.

4. While the Sixth Amendment to the Constitution of the United States, already made obligatory on the States, requires that a person accused of a crime be advised of the nature and cause of the accusation against him, it does not forbid prosecution for "theft by false pretext" on an indictment alleging "theft," where the long existing state law permitted such a procedure, the defendant was accorded a full examining trial at which he was fully advised of the nature of the accusation against him, he was placed on notice sufficiently that he may plead the record and judgment in bar of other prosecutions for the same offense, no claims of surprise was made by the defendant at any time during the trial, and the jury was fully charged as to all essential elements of the offense of "theft by false pretext." *Bartell v. United States*, 1913, 227 U.S. 427, 33 S.Ct. 383; *Burton v. United States*, 1906, 202 U.S. 344, 26 S.Ct. 688, 695.

5. Petitioner in being convicted of "theft by false pretext" was not deprived of "equal protection of the laws" as guaranteed by the Fourteenth Amendment

to the Constitution of the United States, even though he was charged by an indictment alleging "theft," but which omitted an essential element of "theft by false pretext," despite the fact that a defendant being prosecuted on an indictment charging "theft by false pretext" would be entitled under the state law to have the indictment in the latter case quashed for failure to allege all elements of the offense charged, where the long existing state law permited such a procedure, the defendant was accorded a full examining trial at which he was fully advised of the nature of the accusation against him, he was placed on notice sufficiently that he may plead the record and judgment in bar of other prosecutions for the same offense, no claim of surprise was made at any time during the trial, and the jury was fully charged as to all essential elements of the offense of "theft by false pretext."

6. Petitioner was not deprived of "due process of law" as guaranteed by the Fourteenth Amendment to the United States Constitution.

Entered at San Antonio, Texas, this 21st day of June, 1966.

/s/ Adrian A. Spears
Adrian A. Spears
United States District Judge

A true copy of the original, I certify.
MAXEY HART, Clerk
by William L. Swallop
Deputy

FINAL ORDER DENYING RELIEF AND GRANTING CERTIFICATE OF PROBABLE CAUSE

(Number and Title Omitted)

Filed: Jun. 3, 1966

The application of Montgomery Fly Cameron for discharge from custody came on for hearing on the 24th day of May, 1966, on the Petition For Writ Of Habeas Corpus, the Order for said writ, the petitioner's Amendment And Supplement To The Petition For Writ Of Habeas Corpus, the respondent's Motion To Deny Writ Of Habeas Corpus For Lack Of Jurisdiction, and the respondent's Return And Show Cause To Petition For Writ of Habeas Corpus, and the Court having read and considered said pleadings and the exhibits attached thereto and the briefs submitted by the petitioner and the respondent and having considered the evidence offered at the hearing, and it appearing to the Court that the Court does have jurisdiction to entertain this application for habeas corpus relief, and that the relief sought by the petitioner should be denied;

It is therefore ORDERED that the application of Montgomery Fly Cameron for discharge for custody shall be, and it is hereby, denied.

The undersigned judge who renders such order certifies that there exists probable cause for appeal.

It is further ordered that the said Montgomery Fly

Cameron shall be admitted to bail pending appeal, in the sum of $2500.00, with surety to be approved by the United States Commissioner for the San Antonio Division of the Western District of Texas.

Dated this 3 day of June, 1966.

(Signed) ADRIAN A. SPEARS
Adrian A. Spears
United States District Judge

APPENDIX C

Opinion in the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23844

MONTGOMERY FLY CAMERON,
Appellant,

versus

W. B. HAUCK, Sheriff of Bexar County, Texas,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(September 5, 1967.)

Before THORNBERRY, GOLDBERG, and DYER, Circuit Judges.

GOLDBERG, Circuit Judge: Herein of the assessment and application of constitutional standards in the case of the disappearing emerald cufflinks. The facts are no mystery.

The defendant, Cameron, an interior decorator in San Antonio, Texas, was given a pair of emerald cufflinks by a friend. The cufflinks were large. The emeralds in them weighed more than 58 carats, and had been cut in a shape which jewelers call "cabachon," meaning convex and without facets. They had been manufactured by Julius Cohen of New York City in 1963, and sold to Cameron's donor.

Cameron told Cohen, when the latter was in San Antonio, that he was displeased with the cufflinks, and wished to return them to Cohen. Cohen took the cufflinks with him when he returned to New York. A long correspondence ensued between Cameron and Cohen, in which the possibility of Cameron's taking other cufflinks in exchange was discussed. On March 30, 1964, however, Cameron wrote Cohen stating that he wished the emerald cufflinks to be returned. Cohen immediately returned them by registered mail.

Shortly later Cameron asked Cohen if he could return the emerald cufflinks again, in connection with some additional work to be done by Cohen on another pair of cufflinks owned by Cameron. Cohen agreed, took back the emerald cufflinks, and credited Cameron's account with $2,200.

Cohen had previously appraised the emerald cufflinks at $3,400, and on January 10, 1964, Cameron insured against the loss of these cufflinks with Aetna Casualty and Surety Company, valuing them at $3,400.

On July 27, 1964, Cameron reported the "loss" of the cufflinks to Aetna. Later he filed a proof of claim and collected $3,400 from Aetna's Claim Agent, Charles Hedlund.

On January 1, 1965, charges of theft were filed against Cameron before a Justice of the Peace. He requested and was given an examining trial. See Texas Code Crim. Proc., Arts. 15.17 and 16.01-16.21. At this examining trial, held on February 3, the state produced three of the six witnesses and most of the documentary evidence used at the full trial. Cameron, who then had the retained counsel later used at trial, had the right to, and did, cross-examine those witnesses. The defense also produced a witness at the examining trial who testified for the state at the full trial.

On February 23 the Grand Jury indicted Cameron for theft of the money received from the false insurance claim.[1] He was later tried, convicted, and

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[1]The indictment reads:

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS

THE GRAND JURORS duly selected, organized, empaneled, and sworn as such for the County of Bexar, State of Texas, at the January term, A.D. 1965, of the 144th District Court of Bexar County, State of Texas, upon their oaths, present in and to said Court that on or about the 24th day of September, A.D. 1964, and anterior to the presentment of this

sentenced to two years in prison. The Court of Criminal Appeals affirmed the conviction. *Cameron v. State*, 1966, ... Tex. Cr . . . . , 401 S.W.2d 890. All parties agree that he has exhausted his state remedies, as the issues raised here were raised and decided in the Court of Criminal Appeals.

Cameron sought habeas corpus in District Court which was denied. He appeals, and we affirm the denial of the Writ.

I.

Knewel v. Eagan, 1925, 268 U.S. 442, 45 S. Ct. 522, 69 L. Ed. 1036, holds that questions concerning the sufficiency of an indictment cannot be raised on habeas corpus unless they go to the jurisdiction of the court which tried the offense. This case is widely held to be authoritative on such issues as we have here. *Stewart v. Dunn*, 5 Cir. 1966, 363 F. 2d 591 (dictum); *United States ex rel. Tangredi v. Wallack*, 2 Cir. 1965, 343 F. 2d 753; *Kimbro v. Bomar*, 6 Cir. 1964, 333 F. 2d 755.

However, the Supreme Court has questioned

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indictment in the County of Bexar and the State of Texas, Montgomery Fly Cameron did then and there unlawfully and fraudulently take from the possession of Charles Hedlund, the following property, to-wit: Money of the United States of America of the value of over Fifty and No/100 ($50.00) Dollars, the same then and there being the corporeal personal property of and belonging to the said Charles J. Hedlund without the consent of the said Charles J. Hedlund and with the intent then and there on the part of him, the said Montgomery Fly Cameron to deprive the said Charles J. Hedlund of the value of the same, and with the intent to appropriate the said property to the use and benefit of him, the said Montgomery Fly Cameron; against the peace and dignity of the State.

Knewel v. Eagen in *Fay v. Noia*, 1963, 372 U.S. 391, 412, 83 S. Ct. 822, ... , 9 L. Ed. 2d 837, 853, and *Knewel* may no longer be the law.[2] See *Johnson v. Walker*, 5 Cir. 1963, 317 F. 2d 418, 419. This being so, we consider the merits of Cameron's claim concerning the validity of the indictment.

II.

Cameron first claims that his indictment was insufficient by federal constitutional standards to support a conviction for theft by false pretext.

Cameron was indicted for felony theft (see footnote 1, *supra*). Felony theft is defined in Tex. Pen. Code Art. 1410.[3] Further definition follows in succeeding Articles. Article 1411 states that the property taken must have some specific value. Article 1412 states that asportation is not essential to theft. Article 1413 states:

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[2]The Court said: "our development of the law of habeas corpus has been attended, seemingly, with some backing and filling. . . .

"In some of the cases the denial of the remedy on jurisdictional grounds seem to have been chosen in preference to decision on the merits of constitutional claims felt to be tenuous. . . . [Citing, inter alia, *Knewel.*" 372 U.S. at 412, 83 S. Ct. at . . . . , 9 L. Ed. 2d at 853. Footnote 24 says in part: "In Knewel the basis of the habeas petition was a claim of pleading deficiencies and improper venue under state law. Petitioner's assertion that his constitutional rights had been infringed was thus scarcely colorable." *Ibid.*

[3]ARTICLE 1410. "Theft" defined.

"Theft" is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

> The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.

Under this article it is clear that theft by false pretext is included within the general notion of theft, and the Texas Court of Criminal Appeals (the court of last resort in Texas criminal matters) has held from the earliest years of the Penal Code that an indictment for theft will support a conviction for theft by false pretext. E.g., *Vick v. State*, 1965, ... Tex Cr. ....., 397 S.W. 2d 229; *Hogan v. State*, 1965, ... Tex. Cr. ....., 393 S.W.2d 898 (see cases cited 393 S.W. 2d at 900); *Gibbs v. State*, 1953, 158 Tex. Cr. 145, 253 S.W. 2d 1002, *Hawkins v. State*, 1910, 58 Tex. Cr. 407, 126 S. W.268; *Morrison v. State*, 17 Tex. App. 34.

According to Cameron, the problem arises because under Art. 1413, the crime of theft by false pretext requires proof of appropriation of the property, "to the use and benefit of the person taking." On the other hand, he claims, only the intent to appropriate, and not appropriation itself, need be shown under Article 1410.

This argument appears alluring at first glance, but upon examination it disintegrates. The element of

"appropriation" under 1413 is subsumed under the element of "taking" under 1410. In the Texas cases which discuss whether or not an appropriation has occurred under 1413, the clear question under discussion is whether the defendant has done anything inconsistent with the true owner's ownership of the property; in other words, whether the defendant has acted adversely to the true owner's ownership. *McCain v. State*, 1942, 143 Tex. Cr. 521, 158 S.W. 2d 796; *Riggs v. State*, 1934, 125 Tex. Cr. 647, 70 S.W. 2d 164. Especially instructive is *Jones v. State*, 1899, ... Tex. Cr. ....., 49 S.W. 387. In that case the defendant had hired a horse later in the day at Corsicana, where he stated that he intended to return the horse to its owner. The Court stated in part:

> ". . . the proof must show that the obtention of possession was by means of some false pretext made for that purpose, and that the party had the intent at the time to deprive the owner of the value thereof, and to appropriate the property to his own use, and that he did so appropriate it. Measured by this rule, it does not appear to us that the proof shows these constituent elements of the offense beyond a reasonable doubt. So far as the evidence discloses, there was no positive proof of an actual appropriation of the property. It is true this proof can be made by circumstances, and the party may convert the property to his own use while he still has it in possession, not having parted with it; but in such case the proof should establish the fact of the appropriation beyond a probability of suspicion. So far as we are advised from the testimony, there was no concealment on the part of appellant when found at Corsicana as to where he got the horse, and

> his conduct there was not inconsistent with his trusteeship and his intent to restore such horse to the owner."

The same considerations are crucial to deciding whether there has been a "taking" under 1410. E.g., *McKnight v. State*, 1966, ... Tex. Cr. . . . ., 399 S.W. 2d 552; *Johnson v. State*, 1958, 165 Tex. Cr. 468, 308 S.W. 2d 869, *Barnes v. State*, 1942, 145 Tex. Cr. 131, 166 S.W. 2d 708; *Kiser v. State*, 1941, 141 Tex. Cr. 530, 150 S.W. 2d 257; *Ainsworth v. State*, 1930, 115 Tex. Cr. 321, 30 S.W. 2d 310; compare *Smith v. State*, 1945, 148 Tex. Cr. 386, 187 S.W. 2d 572.

Similarly, where there is no doubt about the fraudulent intent of the defendant in a theft by false pretext prosecution, there is no necessity of showing what defendant did with the property once he had it. Proof of "appropriation" in such cases is satisfied by a mere proof of taking. *Lovine v. State*, 1938, 136 Tex. Cr. 32, 122 S.W. 2d 1069; *Hawkins v. State*, 1910, 58 Tex. Cr. 407, 126 S.W. 268.[4] The question of whether there has been an "appropriation" has been treated identically with the question of "taking." See

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[4]Cf. the following language from *McCain v. State*, supra, 133, Tex. Cr. at . . . . , 158 S.W. 2d at 798:

> ". . . appellant was exercising ownership of the horse in offering to sell it for $15, which was much less than its proven value, and the offer to sell was inconsistent with appellant's trusteeship under his pretended borrowing which, if in good faith, contemplated a return of the property to its owner, and not a sale of it by the pretended borrower. We quote from 41 Tex Jur. Sec. 43, p. 63: 'The manner of consummating the appropriation is immaterial. It need not be accomplished by stealth, nor is it necessary, in order to constitute a conversion or appropriation that the property be sold'."

the remarkable opinion of Judge Beauchamp in *Black v. State*, 1941, 141 Tex. Cr. 468, 149 S.W. 2d 968.

The Court of Criminal Appeals, in the present case, drew the obvious conclusion:

> "Under the provision of Art. 1413 . . . . , the only difference between theft by false pretext, defined therein, and ordinary theft [as defined in 1410] is the circumstances by which the property came into possession of the accused."

Thus, the use of "appropriation" in 1413 adds nothing of substance to the crime defined in 1410, because no additional element of, or defense to, the crime of theft is created by its use.[5] Cameron was not disadvantaged by the failure of the state to allege appropriation, because that allegation would have been surplusage.[6]

We hold that the indictment sufficiently apprised Cameron of all of the elements of the offense he was

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[5]The wording of 1413 suggests that it, like Articles 1411-12 and 1414-19, is definitional merely, and does not set out a separate offense. Indeed 1413 deals specifically with the belief at common law that taking by false pretext was "lawful" because of the "consent" of the owner. Instead of striking down this fiction and stating that a taking by false pretext is as unlawful as other kinds of theft, 1413 instead travels the more circuitous route of stating that "if the taking, *though originally lawful, was obtained by false pretext, . . . and the . . . [property] is . . . appropriated [to the use and benefit of the person taking]*, the offense of theft is complete." [emphasis added.] Thus, the original taking is still deemed "lawful," so the "wrongful takng" element of 1410 is announced in 1413 by the word "appropriate."

[6]Any indication to the contrary from the out-of-point case of *Heidenrich v. State*, 1943, 145 Tex. Cr. 468, 168 S.W. 2d 254, has obviously been disapproved of by the later cases.

charged with, and that Cameron's argument that he was indicted for one offense and tried for another is without merit. Cameron relies heavily on *Cole v. Arkansas*, 1948, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644. There, the defendants were indicted, tried, and convicted in the trial court for assembling near a place where a labor dispute existed, and by force and violence, there preventing a person from engaging in a lawful occupation. This offense violated §2 of an Arkansas law. On appeal the defendants challenged the constitutionality of §2, and the Arkansas Supreme Court held that it need not consider these constitutional claims because the convictions could be affirmed under §1 of the same act, which set out the different offense of acting singly with force and violence to prevent anyone from engaging in a lawful occupation. The United States Supreme Court held that the crimes set out by §1 and §2 were different, and that affirmance of the convictions under §1 was invalid, because the defendants had not been indicted or notified at any time during trial that §1 would be, ultimately, the charge against them.

In the present case we hold that under Texas law, the crimes described by 1410 and 1413 are the same and that a charge under 1410 notifies a defendant of all elements of a 1413 offense.[7] Theft is a synoptic concept: the Eighth Commandment condemns theft without explaining every possible nuance and contrivance in its accomplishment. Theft by false pretext is merely one genus of the species, and Texas

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[7]Reliance by Cameron on federal cases controlled by Rule 7, F. R. Crim. P., is misplaced. The Federal Rules do not apply to state cases.

has treated it so. This statutory treatment makes sense. It is not a whimsical conjuration. See *Jackson v. United States*, D.C. Cir. 1692, 313 F. 2d 572.

The Constitution does not impropriate the crime-defining functions of the states. It proscribes prosecution where indictments do not meet constitutional standards.

> "Courts measure the sufficiency of an indictment by two basic criteria: '[F]irst, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,' "and, secondly, " 'in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' "Russell v. United States, 1962, 369 U.S. 749, 763, 764, 82 S.Ct. 1038, 1047, 8 L. Ed. 2d 240, 250-251; Van Liew v. United States, 5 Cir. 1963, 321 F. 2d 664, 669."

Webb v. United States, 5 Cir. 1966, 369 F. 2d 530, 535-6.

The indictment informed Cameron of all of the elements of the offense, and provides a sufficient shield for the plea of prior acquittal or conviction. See e.g. *Carlile v. State*, 1923, 97 Tex. Cr. 477, 262 S.W. 489; compare *Donahoe v. State*, 1955, 161 Tex. Cr. 468, 278 S.W. 2d 138. Cameron was supplied by the examining trial with a detailed precis of the facts which the government intended to prove. He did not claim surprise at the full trial.

In fact, Cameron's only real complaint is that 1413 explains the offense in different terms from 1410 and the indictment. But both explanations are complete and coextensive. While a more felicitous wording of 1413 is imaginable, its present form does not deny due process. *Spencer v. Texas*, 1967, 385 U.S. 554, 87 S. Ct. 648, 17 L.Ed. 2d 606.

III.

Cameron's next argument arises because under Texas law an indictment for theft by false pretext may be stated either in terms of 1410, and in the present case, or in terms of 1413. Where the indictment is in the latter form, failure to allege appropriation renders it fatally defective. *Byrd v. State*, 1965, ... Tex. Cr. ....., 368 S.W. 2d 196; *Schoenbeck v. State*, 1956, 163 Tex. Cr. 14, 288 S.W. 2d 121; see *McQuiston v. State*, 1942, 143 Tex. Cr. 283, 158 S.W. 2d 527.[8]

Cameron argues:

> "Even if it should be held that the Fourteenth Amendment due process right to a specific accusation does not forbid prosecution for theft by false pretext on an ordinary theft indictment, it is evident that an accused who is so prosecuted is deprived of the protection of the laws afforded an accused who is prosecuted on an indictment which charges theft by false pretext; because the latter

[8]It should be noted that *McQuistion* and other cases cited by Cameron deal with the problem of distinguishing theft by false pretext from swindling, a separate issue under Texas law. See Steele, Misappropriation, Without Violence in Texas, 10 Southwestern L. J. 415 (1956).

> accused, but not the former, is guaranteed by Texas law that his indictment must state the essential elements of the offense with which he is charged. The result is that the accusing and prosecuting authorities have an election, in theft by false pretext prosecutions against similarly situated individuals, to allege or not to allege the essential elements of the offense."

As we hold that an ordinary theft indictment framed under 1410 contains all of the elements of theft by false pretext, Cameron's argument here is reduced to claiming that the equal protection clause is violated if the prosecutor chooses a simpler form of indictment when a more complicated form, more prone to fatal defect, is available. Cameron seeks only to fish for error in a larger pond. Such a foray is not protected by the equal protection clause.

IV.

Cameron's final argument is based upon the following language in the opinion of the Court of Criminal Appeals in the present case:

> It is appellant's contention that because the court's charge authorized the jury to convict him upon a finding that he fraudulently represented that the set of cufflinks was "lost, stolen, or misplaced" and there was no proof that he represented that the cufflinks were stolen, it is impossible to determine whether the verdict had any factual basis in the evidence.
>
> While there was no proof that appellant represented that the cufflinks were stolen,

there was proof in the record that he represented that they were lost or misplaced. The general verdict of guilty can be applied to that portion of the charge submitting the question of his misrepresentation that they had been lost or misplaced, which has support in the evidence.

Cameron cites, among others, *Stromberg v. California*, 1931, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117; *Williams v. North Carolina*, 1942, 317 U.S. 287, 63 S. Ct. 107, 87 L. Ed. 279, and *Shuttlesworth v. Birmingham*, 1965, 382 U.S. 87, 86 S. Ct. 211, 15 L. Ed. 2d 176. None of these cases applies here. The cited cases are relevant where the jury is told that it may convict upon any of several inculpatory theories which are all supported by evidence, and the jury renders a verdict of guilty, and on appeal one of the theories upon which the jury was charged is held legally incapable of supporting a conviction. In such cases it is impossible to tell from the general verdict upon which of the theories the jury had convicted. The obvious assumption is that the jury, being incapable of deciding whether a legal theory is valid or invalid, might decide to convict upon an invalid theory which is supported by the evidence. Such convictions violate due process.

In the present case Cameron asks us to assume quite another matter: i.e., that the jury having been given three legally valid possibilities for a false representation, may have chosen to convict upon the one of the possibilities for which there was no evidence. But deciding the facts is the jury's province, and our jury system is founded upon the notion that juries

decide facts in accordance with the evidence. There was substantial evidence to support a jury finding that Cameron had falsely represented the cufflinks to be lost or misplaced. The jury was not misled as to the law. We do not think, upon this record, that the slight possibility of jury prejudice mentioned by Cameron here comes anywhere near suggesting a violation of due process. *Cf. United States ex rel. Colon v. Follette*, 2 Cir. 1966, 366 F. 2d 775; *United States ex rel. Castillo v. Fay*, 2 Cir. 1965, 350 F. 2d 400, cert. denied, 1966, 382 U.S. 1019.

Even tested by the protective standards of *Fay v. Noia, supra*, Cameron's atacks are meritless and do not approach Constitutional measurement.

The judgment is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23844

D. C. Docket No. CA 66-57-SA

MONTGOMERY FLY CANNON,

Appellant,

versus

W. B. HAUCK, Sheriff of Bexar County, Texas,

Appellee.

Appeal from the United States District Court for the Western District of Texas

Before THORNBERRY, GOLDBERG, and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Montgomery Fly Cameron, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 5, 1967

Issued as Mandate: (10-26-67)

[761]—Goldberg

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 23,844

MONTGOMERY FLY CAMERON,

Appellant,

vs.

W. B. HAUCK, Sheriff of Bexar County, Texas,

Appellee.

Appeal from the United States District Court for the Western District of Texas

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(October 4, 1967)

Before THORNBERRY, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

It is ORDERED that appellant's petition for rehearing in this cause is hereby DENIED.

Petition for Rehearing filed 9/25/67.

Petition for Rehearing denied 10/4/67.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23844

MONTGOMERY FLY CANNON,
Appellant,

versus

W. B. HAUCK, Sheriff of Bexar County, Texas,
Appellee.

Appeal from the United States District Court for the Western District of Texas

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ORDER:—

ON CONSIDERATION of the Motion of appellant for stay of mandate to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, and of the opposition of appellee thereto,

IT IS ORDERED that said motion be, and it is hereby DENIED, except that appellant is granted a ten day stay from this date in order to seek a further stay from the Supreme Court of the United States.

IRVING L. GOLDBERG
U. S. CIRCUIT JUDGE